In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 359

JIMMIE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE FOR THE UNITED STATES

The Court has requested a reply to the petition for rehearing in which it is contended that the trial judge erred in imposing sentence on petitioner by weighing against him the fact that he chose to stand trial. We note, at the outset, that this question was not raised in any form either in the district court or the court of appeals and that it was not presented in the petition for certiorari.

1. Petitioner relies upon the following statement of the trial court at the time of sentencing (Pet. for rehearing, App. 7):

> I am not unmindful of the fact that here was a fairly extended trial before a jury at the expense of $500 to the taxpayers. There

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> was no defense put up except an attack upon the credibility of the government witness, Mr. Harris.

When these remarks are read as a whole—in the context of the facts as developed at the trial—we think it fairly inferable that the judge was referring to the quality of the defense rather than the fact that defendant went to trial.[1]

The witness Harris testified that he observed petitioner regularly carry bags of numbered wagering slips to a store where he would total the bets on an adding machine. Harris actually saw petitioner accept bets and receive money and tickets from others (Tr. 8–30). The defense offered testimony by a friend of petitioner who allegedly was told by Harris, after petitioner's arrest, that he, Harris, had made a mistake about petitioner (Tr. 104–105, 111). In rebuttal, Harris brought out that this witness had tried to see if he was amenable to a bribe (Tr. 147).

Another illustration of the defendant's evidence is the testimony of a waitress employed at the Green Light Inn. She asserted that Harris, on the night before she gave her testimony, attempted to induce her to go to bed with him (Tr. 127–129). On cross-questioning, the waitress was unable to identify anyone who overheard Harris make the alleged advances although the incident supposedly occurred in a crowded bar; she claimed not to know the petitioner, but just happened to appear at his trial to give evidence on his behalf; finally, she acknowledged that

[1] We are filing with the Clerk the transcript of proceedings, and a copy of the pre-sentence report.

petitioner had personally asked her to be a witness (Tr. 129–132).[2] Moreover, the evidence showed that petitioner himself had also spoken to at least one other individual in an attempt to suppress information relevant to the manner in which he conducted his gambling operations (Tr. 140–141).

Every accused risks the possibility that a trial will turn up matters unfavorable to him. Here, as in other cases, the judge, after seeing and hearing the witnesses, apparently considered what he learned at the trial in deciding upon the sentence to be imposed upon petitioner. However, petitioner's character—exhibited by the nature of his defense—was a material element properly to be taken into account in arriving at an appropriate sentence. See *Williams v. New York*, 337 U.S. 241, 244, 247, 252.

Petitioner's listing of the lesser sentences received by persons arrested at the same time who chose to plead guilty (Pet. for rehearing, App. 8) constitutes an insufficient showing that the sentence imposed on petitioner was unreasonable. None of those persons was in any way connected with petitioner's operations. The United States Attorney informs us that investigation revealed three separate numbers operations in the Toledo area—that of petitioner; that of one Kovacs, who died before his trial; and that of three Besase brothers who, in September 1965, were convicted of evasion of the wagering tax and sentenced to imprisonment for five years. The persons

[2] Harris testified that at the time he allegedly accosted the girl he and a friend were in a theatre watching a telecast of a prize fight (Tr. 149–151).

listed in the appendix to the petition for rehearing were *employed* in the Besase or Kovacs operations. The evidence against petitioner indicated that he conducted his own operation and grossed about $5,000 a day. Petitioner's situation cannot fairly be compared to that of a mere employee in a different operation. In addition, the pre-sentence report on the petitioner (which was before the trial judge) sets forth his prior criminal record and further distinguishes his particular background from that of the others.

2. We do not for a moment suggest that it is permissible practice for a trial judge to add to a penalty because a defendant has rested upon his constitutional right to put the government to its proof.[3] Rather, we question, for the reasons noted above, whether this record demonstrates that this in fact occurred. If, however, the Court is of the view that the matter is sufficiently doubtful to call for further examination, we suggest that the appropriate course

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[3] In one such case, a reviewing court has ordered resentencing. *United States* v. *Wiley*, 278 F. 2d 500, 504 (C.A. 7). See, also, *Simpson* v. *United States*, 342 F. 2d 643 (C.A. 7); but note the differing views expressed at the 1959 Pilot Institute on Sentencing (26 F.R.D. 231, 285–289). On the other hand, the fact that several persons have committed the same crime does not of itself require parity in sentencing. 1964 Institute on Sentencing, 35 F.R.D. 381, 387–389 (remarks of Judge Youngdahl). A sentence should be "tailored for individualized treatment." *Id.* at 389. In that connection, a judge's observations of the defendant "during trial or at the time of sentence" are, like the pre-sentence report, important in assessing the defendant's attitudes and character. 1964 Institute on Sentencing, 37 F.R.D. 111, 123; 1959 Pilot Institute on Sentencing, 26 F.R.D. 231, 323, 327–328. See *Williams* v. *New York*, *supra*.

would be to grant the writ, vacate the sentence and remand the case to the court of appeals. As noted above, petitioner failed to raise the issue at any point in the proceedings prior to his petition for rehearing of this Court's order denying certiorari. If further proceedings are nonetheless deemed warranted, orderly procedure would suggest that the record be reviewed in the first instance by the court of appeals. Cf. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 497.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DECEMBER 1965.

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